



U.S. Citizenship
and Immigration
Services

FILE:

Office: NEBRASKA SERVICE CENTER

Date:

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DEC 27 2004

IN RE:

Petitioner:

Beneficiary:

PETITION: Immigrant Petition for Alien Worker as an Outstanding Professor or Researcher pursuant to Section 203(b)(1)(B) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(1)(B)

ON BEHALF OF PETITIONER:

PUBLIC COPY

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

Maie Plunova

Robert P. Wiemann, Director
Administrative Appeals Office

Identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy

DISCUSSION: The employment-based immigrant visa petition was denied by the Director, Nebraska Service Center, and is now before the Administrative Appeals Office on appeal. The appeal will be dismissed.

The petitioner is a university. It seeks to classify the beneficiary as an employment-based immigrant pursuant to section 203(b)(1)(B) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(1)(B), as an outstanding professor or researcher. The petitioner initially sought to employ the beneficiary as a "Research Associate" in the Department of Surgery. The director determined the petitioner had not established that it extended an offer of permanent employment to the beneficiary.

Section 203(b) of the Act states, in pertinent part, that:

(1) Priority Workers. -- Visas shall first be made available ... to qualified immigrants who are aliens described in any of the following subparagraphs (A) through (C):

(B) Outstanding Professors and Researchers. -- An alien is described in this subparagraph if-

- (i) the alien is recognized internationally as outstanding in a specific academic area,
- (ii) the alien has at least 3 years of experience in teaching or research in the academic area,
and
- (iii) the alien seeks to enter the United States --
 - (I) for a tenured position (or tenure-track position) within a university or institution of higher education to teach in the academic area,
 - (II) for a comparable position with a university or institution of higher education to conduct research in the area, or
 - (III) for a comparable position to conduct research in the area with a department, division, or institute of a private employer, if the department, division, or institute employs at least 3 persons full-time in research activities and has achieved documented accomplishments in an academic field.

The regulation at 8 C.F.R. § 204.5(i)(3) states that a petition for an outstanding professor or researcher must be accompanied by:

(iii) An offer of employment from a prospective United States employer. A labor certification is not required for this classification. The offer of employment shall be in the form of a letter from:

(A) A United States university or institution of higher learning offering the alien a tenured or tenure-track teaching position in the alien's academic field;

(B) A United States university or institution of higher learning offering the alien a permanent research position in the alien's academic field; or

(C) A department, division, or institute of a private employer offering the alien a permanent research position in the alien's academic field. The department, division, or institute must demonstrate that it employs at least three persons full-time in research positions, and that it has achieved documented accomplishments in an academic field.

As used in this section, the term "permanent," in reference to a research position, means either tenured, tenure-track, or for a term of indefinite or unlimited duration, and in which the employee will ordinarily have an expectation of continued employment unless there is good cause for termination. 8 C.F.R. § 204.5(i)(2).

This petition was filed on January 23, 2003. A letter accompanying the petition, dated October 3, 2002, from Dr. [REDACTED] Department of Surgery, Ohio State University, to the "Immigration and Naturalization Service," states:

Please be advised that [the beneficiary] has been employed by The Ohio State University under an H-1B visa. Also, the job set forth on the immigrant petition for alien worker (I-140) form is still being offered to her under the same terms and conditions as those set forth on the form. To summarize, the job is for a Research Associate including a salary of \$34,896/year. [The beneficiary] has accepted the terms of employment and she will become a member of our staff upon approval of her application for permanent residence.

The evidence accompanying the petition included no formal job offer letter, i.e., a letter from the petitioner addressed to the beneficiary that sets forth a binding offer of employment for the Research Associate position. The regulation at 8 C.F.R. § 204.5(i)(3)(iii)(B), however, specifically requires that "[t]he offer of employment shall be in the form of a letter from . . . [a] United States university or institution of higher learning offering the alien a permanent research position in the alien's academic field." [emphasis added] Dr. [REDACTED] letter indicates that the beneficiary is employed by Ohio State University, but it does not constitute a formal offer of permanent employment addressed to the beneficiary. Rather, it is a letter to the "Immigration and Naturalization Service" which merely confirms the petitioner's acceptance of an offer of employment made earlier. The record does not contain any documentation, pre-dating the petition's filing date, that initiated an employer-employee relationship between the petitioner and the beneficiary or otherwise extended a permanent job offer from the petitioner to the beneficiary. Basic information about the beneficiary's job position listed on the Immigrant Petition for Alien Worker, Form I-140, does not relieve the petitioner of satisfying the requirements set forth at 8 C.F.R. § 204.5(i)(3)(iii)(B).

The petitioner also submitted a letter, dated September 24, 2002, from Dr. [REDACTED] Vice-Chairman, Department of Surgery, and Director of the Laboratory of Molecular Medicine, Ohio State University, stating: "Currently [the beneficiary] holds an appointment until the end of September 2003. If she would be willing to continue, I would be most enthusiastic about employing her here permanently."

The petitioner also provided the beneficiary's resume and other documentation indicating that, at the time of filing, the beneficiary held a "Research Associate" position at the university.

On October 1, 2003, the director requested specific documentation pertaining to the absence of a job offer letter from the petitioner to the beneficiary. The director's request for evidence stated: "Please submit a complete copy of the actual offer of employment made by The Ohio State University to [the beneficiary]."

In response, the petitioner submitted a second letter from Dr. [REDACTED] dated October 7, 2003 and addressed to "Citizenship and Immigration Services" (CIS) rather than the beneficiary. Dr. [REDACTED] letter states:

The purpose of this letter is to verify that [the beneficiary] is working for this institution in the position of Research Scientist Since the time the petition was filed, [the beneficiary] has been promoted to the Research Scientist position in recognition of her accomplishments.

Her salary is presently \$44,616/year.

[The beneficiary] continues to accept the terms of employment with The Ohio State University

Dr. Sen's October 7, 2003 letter is an employment verification letter addressed to CIS rather than the original "complete copy of the actual offer of employment made by The Ohio State University to [the beneficiary]" (as requested by the director). Again the petitioner has submitted an employment verification letter rather than a job offer letter from the petitioner to the beneficiary that sets forth a binding offer of permanent employment, including specific terms thereof. In addition, the position described above relates to a "Research Scientist" position rather than the "Research Associate" position cited in the original letter from Dr. Johnson.

We note here that a petitioner must establish eligibility at the time of filing; a petition may not be approved at a future date after the petitioner becomes eligible under a new set of facts (i.e., based on eligibility resulting from a new job offer). See *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971). Furthermore, the regulation at 8 C.F.R. § 103.2(b)(12) states, in pertinent part: "*Effect where evidence submitted in response to a request does not establish eligibility at the time of filing. An application or petition shall be denied where evidence submitted in response to a request for initial evidence does not establish filing eligibility at the time the application or petition was filed.*" The letter submitted in response to the director's request for evidence fails to demonstrate that a permanent job offer from Ohio State University to the beneficiary existed as of this petition's filing date (January 23, 2003).

The director denied the petition, stating:

The petition as initially filed contained an October 3, 2002, letter by Dr. Jerome Johnson

* * *

The initial evidence did not, however, include a copy of a letter by the petitioner offering the beneficiary a permanent research position.

In correspondence dated October 1, 2003, the petitioner was requested to submit a complete copy of the actual offer of employment made by The Ohio State University to the beneficiary. The petitioner's

response was received on October 16, 2003, and has been incorporated into the record for consideration. In responding, the petitioner has not furnished the requested evidence.

* * *

No representation was made on filing that the terms of the beneficiary's past employment have not been committed to writing, nor that the terms of any future employment will not be committed to writing.

[CIS] initially found and on re-examination reaffirms that Dr. [REDACTED] letter does not constitute an offer by the petitioner to the alien of a permanent research position. The letter, for example, is addressed to the prospective employee and was not issued by the University's administrative or human resource office

* * *

[CIS] recognizes that individual institutions vary in their particular hiring practices but, for the purposes of this classification, the regulation requires that an offer of a permanent research position be submitted as initial evidence. Title 8, Code of Federal Regulations, Part 103.2(b), states: "An application or petition form must be completed as applicable and filed with any initial evidence required by regulation or by the instructions on the form."

In responding, the petitioner submits an October 7, 2003 letter address to [CIS]. The letter by Dr. [REDACTED]

* * *

At the time the petition was filed, it appears that the beneficiary was employed as a Research Associate. The letter by Dr. [REDACTED] suggests that the Department or University has had subsequent communication with the beneficiary regarding new employment as a Research Scientist. However, the petitioner has elected to withhold the requested copy of that communication.

In evaluating whether a given offer of employment is permanent within the meaning of the regulation, [CIS] is willing to consider all evidence having a bearing on the issue, but must necessarily examine the specific terms contained in the offer of employment made by the employing institution. It is precisely that document that was requested. Title 8, Code of Federal Regulations, Part 103.2(b)(14) states, in pertinent part:

Failure to submit requested evidence which precludes a material line of inquiry shall be grounds for denying the application or petition.

The missing documentary evidence is material to eligibility for the benefit sought. The petition is denied pursuant to Title 8, Code of Federal Regulations, Part 103.2.

On appeal, the petitioner submits a third letter from Dr. Sen, dated January 18, 2004 and addressed to the beneficiary, stating:

In response to your request, this is an official letter of offer for the Research Scientist position that you have accepted effective April 5, 2003 that was never reduced to writing. The terms and conditions indicated in this letter reflect the commitments we have made to you during communications leading to the hire.

I am pleased to offer you a permanent research position with the title of Research Scientist (OSU job group 325) in the Dorothy M. Davis Heart and Lung Research Institute at The Ohio State University. The research scientist position will be full-time (100% FTE) and permanent in the Molecular Medicine program with a salary of \$46,616 per year, paid in monthly installments.

Your appointment will include the comprehensive benefits package and menu of healthcare choices.

* * *

As with all permanent research faculty and staff appointments in Molecular Medicine, you will be reviewed annually through my office to determine merit, raises, and to discuss job performance and accomplishments.

We note here that the position described in the October 7, 2003 and January 18, 2004 letters from [REDACTED] that of a "Research Scientist." What the record is lacking, however, is first-hand evidence of a job offer letter, letter of commitment, or contract issued by the university to the beneficiary that existed as of the petition's filing date for the original "Research Associate" position. Here, we refer back to the October 3, 2002 letter from Dr. [REDACTED] indicating that the permanent job offer was "for a **Research Associate** including a salary of \$34,896/year." [emphasis added] A petitioner may not make material changes to a petition that has already been filed in an effort to make a deficient petition conform to CIS requirements. *See Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm. 1998).

Dr. [REDACTED] January 18, 2004 letter states that the permanent offer for the Research Scientist position that the beneficiary "accepted effective April 5, 2003 . . . was never reduced to writing."

On appeal, counsel states: "It is perplexing to be accused of withholding evidence while none other than what was sent to [CIS] existed." Counsel's observation that "none other than what was sent to [CIS] existed" is not supported by the documentation presented on appeal.

The petitioner's appellate submission included a document printed from Ohio State University's website entitled "Research Scientist Appointments." Under the heading "Appointment Procedures" the document states:

Research Scientists . . . may be appointed in a department, division, center, institute, or laboratory. The initiation of an appointment may come from any faculty member (sponsor) or the department chair. All requests must be accompanied by a letter of support from the department chair and submitted to the Interim Senior Associate Vice President for Research for approval.

* * *

An individual should not be offered a Research Scientist . . . position until the credentials have been reviewed and recommended by the department chair, and approved by the Office of Vice President for Research All actions in the ARMS Human Resources System are routed to the Office of Research for Review and/or approval.

According to Ohio State University's Research Scientist "Appointment Procedures," if the beneficiary's Research Scientist job offer had existed at the time of filing but "was never reduced to writing" (as claimed on appeal by counsel and Dr. [REDACTED] then the petitioner should still be able to provide contemporaneous evidence in the form of a "letter of support from the department chair . . . to the Interim Senior Associate Vice President for Research" and communication of approval of the job offer by the Office of the Vice President for Research. Without evidence showing that such personnel actions (as mandated by the university) had occurred as of January 23, 2003, we cannot accept that a binding offer of permanent employment was presented to the beneficiary as of the petition's filing date. It is noted that Dr. [REDACTED] January 18, 2004 letter indicates that the Research Scientist job offer was not officially accepted by the beneficiary until April 5, 2003.

Pursuant to the regulations, the petitioner's failure to provide contemporaneous evidence of the original permanent job offer creates a presumption of ineligibility. The regulation at 8 C.F.R. § 103.2(b)(2)(i) states, in pertinent part:

The non-existence or other unavailability of required evidence creates a presumption of ineligibility. If a required document, such as a birth or marriage certificate, does not exist or cannot be obtained, an applicant or petitioner must demonstrate this and submit secondary evidence, such as church or school records, pertinent to the facts at issue.

In this case, the petitioner has not presented an original permanent job offer letter (pre-dating the petition's filing date) for either the Research Associate or the Research Scientist position, nor has it provided contemporaneous secondary evidence from Ohio State University's Office of Research demonstrating that a "permanent" job offer existed between both parties as of January 23, 2003. The petitioner's failure to present contemporaneous evidence of the original job offer from the university *to the beneficiary* for a permanent research position is a crucial omission from the record. The record contains no evidence of a job offer between the petitioner and the beneficiary that existed at the time of filing and which sets forth a binding offer of permanent employment.

It is further noted that, according to the Ohio State University Research Scientist "Appointment Procedures" presented on appeal: "Qualified persons may be appointed for indefinite periods of time and renewals of appointment are contingent upon satisfactory performance as determined by the supporting unit and the department chair." The term "renewals of appointment" raises questions as to whether appointment to a Research Scientist position constitutes an appointment of indefinite or unlimited duration, and in which the employee will ordinarily have an expectation of continued employment unless there is good cause for termination. Without further evidence, we are not persuaded that employment of an individual whose

appointment "renewal" is contingent upon some type of periodic university action (such as an annual job performance review) constitutes permanent employment as defined at 8 C.F.R. § 204.5(i)(2).

For the above stated reasons, we find petitioner has not established that it extended a binding offer of permanent employment to the beneficiary as of the filing date of the petition. The record does not contain any qualifying documentation, pre-dating the petition's filing date, that initiated an employer-employee relationship between the petitioner and the beneficiary or otherwise extended a permanent job offer from the petitioner to the beneficiary. Therefore, the petitioner has not established eligibility pursuant to 8 C.F.R. § 204.5(i)(3)(iii)(B).

The burden of proof in visa petition proceedings remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, the petitioner has not sustained that burden. Accordingly, the appeal will be dismissed.

ORDER: The appeal is dismissed.